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Nos. 20378, 20447 and 20522

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEDERAL HOME LOAN BANK BOARD, ET AL.,

Appellants

3369
3416

v.

SIDNEY ELLIOTT, ET AL.,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

APPELLANTS' REPLY BRIEF

BAREFOOT SANDERS,
Assistant Attorney General,

JOHN K. VAN de KAMP,
United States Attorney,

CARL EARDLEY,
MORTON HOLLANDER,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

f Counsel

AX WILFAND,
Assistant General Counsel,
Federal Home Loan Bank Board.

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CITATIONS

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PRELIMINARY STATEMENT

The appellees' 192 page brief would seem, on its face, to requ a lengthy reply brief. However, once the reckless and repetitious hyperbole has been put to one side there is not much left for comme Appellees apparently have decided to make it appear that an autocratic and vindictive federal agency in far off Washington has been hounding an innocent California savings and loan association for twenty years, and is still continuing its persecution, even though the association has merged with a state savings and loan stock company, and is no longer in effective existence.

It is true that the Federal Home Loan Bank Board has on three occasions preferred charges of mismanagement against Long Beach and that on two of those occasions, in 1946 and 1960, it took over Long Beach's management. But although the upper courts frequently rever the rulings of Judge Hall in the litigation which followed the Boar action,[1/] success at the appellate levels did not bring the charges o mismanagement to issue, and in February 1962 the Board entered into a Settlement Agreement, which compromised the many differences then existing between the Board and Long Beach and which set forth a Boa approved plan for the liquidation of Long Beach. And this is the

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1/ See Ex parte Fahey, 332 U.S. 258 (1947); Home Loan Bank Board Mallonee, 196 F. 2d 336 (1952), cert. den. 345 U.S. 952; Fahey v. O'Melvenny and Myers, 200 F. 2d 420 (1952), cert. den. 345 U.S. 952 Fahey v. Calverley, 208 F. 2d 197 (1953), cert. den. 347 U.S. 955; Federal Home Loan Bank Board v. Hall, 225 F. 2d 349 (1955), cert. den. 350 U.S. 968; Ammann v. Home Investment Co., 243 F. 2d 748 (19

nitial date from which the instant controversy flows. All references o preceding events (and particularly to the fanciful twenty years of ersecution) are irrelevant.

Apparently for fiscal reasons Long Beach, as it had a right to do bandoned its plan of liquidation as set forth in the Settlement Agree ent, and in May 1962 proposed an outright merger with Equitable. ong Beach recognized that the proposed merger would require approval f both the Board and the California Savings and Loan Commissioner, nd initially submitted the proposal to the Board. In the meantime, he Board had discovered that friends of management (both Long Beach nd Equitable) had poured millions of dollars, much of it borrowed, nto Long Beach, in the obvious expectation of participating in the istribution of the Long Beach's large net worth. The Board believed hat Long Beach had not been fair to the regular Long Beach depositors n permitting this influx, and advised Long Beach that a merger greement which would permit these late and heavy depositors to hare <u>pro rata</u> in the distribution would not meet with Board approval. hereupon Long Beach revised its merger proposal to meet the Board's iews, and, as revised, the merger agreement was executed by Long each and Equitable on June 12, 1963 and thereafter approved by Long each members and Equitable stockholders and by the federal and state upervisory agencies. The merger took place on September 10, 1963, nd once consummated these actions were filed to have the distribution rovisions of the merger agreement declared invalid, and <u>pro rata</u> istribution ordered.

In this short reply brief the appellants will endeavor to summarize the court rulings, the appellants' bases for exception, the appellees' response to appellants' argument, and such new matter as appellants may deem appropriate in view of appellees' response.

At the outset it should be noted that, despite appellees' inferences to the contrary, the District Court ruled that there were no factual issues involved, and that its decision was based entirely upon certain legal conclusions. In view of this determination, appellants will not dwell on the numerous allegations of fact made by appellees, which are either in error or irrelevant,[2/] but will confine themselves to the legal issues confronting this Court.

In this reply brief appellants will touch briefly on the following basic issues: I -- The Power of the District Court to Revise the Merger Agreement, II -- Appellees' Remedy as Affected by Laches, and III -- The Legality of the Merger Provisions.

I

The Power of the Court to Alter the Terms of the Merger

The District Court ruled that it had the power to order distribution of the Equitable stock on a pro rata basis. Judge Hall declared that the merger was consummated under 12 U.S.C. 1464(i), and that this provision required pro rata distribution. This

2/ See Appendix hereto for comment on some of appellees' most flagrant departures from fact.

section prescribes the procedures in the event of a <u>conversion</u>. A conversion is the transformation of a federal association into a state association, or vice versa. A conversion involves only one association. A merger involves <u>two</u> associations not <u>one</u>. A conversion is not a merger. (See Appellants' Brief, pp. 25-27.) Even Long Beach during the course of the proceedings below never suggested that the merger was being consummated under 12 U.S.C. 1464(i). This was a contribution of the trial judge, and was patently in error. As we have pointed out (Appellants' Brief, pp. 27-29) all parties acted upon the assumption that the merger, insofar as federal law was concerned, was being processed under 12 U.S.C. 1464(d)(2)(as it read before being amended in 1966 -- P.L. 89-695 of October 16, 1966)[3/] and 12 C.F.R. 546.4[4/] which do <u>not</u> specify <u>pro rata</u> distribution in the event of merger. But 12 C.F.R. 546.4 does require Board approval of the merger.

The appellees made no effort to reply to the appellants' contentions, but simply assumed, without any analysis whatsoever, that 12 U.S.C. 1464(i) required <u>pro rata</u> distribution of net worth in

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3/ Section 5(d)(2), as it reads now, still contains substantially the same provision with respect to mergers as the former statute. Because of the saving clause in Section 101(b) of P.L. 89-695, however, these appeals are still governed by the statute as it read prior to its recent amendment.

4/ Since filing its opening brief, the Board has promulgated an explicit regulation dealing with a merger of a Federal association into a state-chartered institution. Under this newly promulgated regulation, Board approval is necessary. See 31 F.R. 15235, dated December 6, 1966; corrected in 31 F.R. 155691, dated December 10, 1966.

this instance. (See Appellees' Brief, pp. 42, 63, 85, 88-89, 90, 91, 92, 115, 140-141.) They attempted to gloss over the fact that the statute relates to conversion, not merger, by referring to the merger here, as a "conversion by merger", whatever that may mean. (Appellees' Brief, p. 47.) Nor did the appellees respond to the appellants' contention that Board approval of the merger was required under 12 C.F.R. 546.4.

Manifestly, in 12 U.S.C. 1464(d)(2) the Congress delegated to the Board, and not to the courts, the power to regulate mergers of federal savings and loan associations. The Court, by reforming the Merger Agreement to substitute pro rata distribution for the distribution formula contractually agreed upon and approved by the Board, assumed the regulatory power of the Board. Of the many errors which we believe the lower court committed in its decision, this attempted seizure of administrative power seems the most egregious. (See Appellants' Brief, pp. 25-31.)

The District Court then attempted to support its exercise of administrative power by stating that the provision in the Merger Agreement giving shareholders the right to judicially contest the merger, if anyone so desired, was, in effect, a consent by the Board to disposition of the controversy by the Court. How the statement of shareholders' existing rights could constitute an abandonment by the Board of its regulatory responsibility neither the District Cour nor appellees pointed out. (See Appellants' Brief, pp. 31-33.) The District Court also attempted to justify its action by concluding that it was merely enforcing the contractual agreement of the parties

as set forth in the Settlement Agreement. As appellants pointed out (Appellants' Brief, pp. 33-37), the liquidation plan in the Settlement Agreement was far different from the Merger Agreement now before this Court.

Although it seems evident to appellants that the power of the District Court to assume regulatory functions is probably the primary issue in these appeals, and although appellants endeavored to cite the relevant authorities (Appellants' Brief, pp. 30-31), expecting to join issue with appellees on this point, appellees again avoided such joinder, and failed to comment upon any of the cited cases.[5/]

II

Appellees' Remedy as Affected by Laches

The District Court did not comment on the appellants' contention (pp. 37-39) that the only available remedy to the then

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5/ The appellees did mention S.E.C. v. Chenery (318 U.S. 80) but in a different context (Appellees' Brief, p. 99). In that case S.E.C. approved a plan of reorganization of a holding company which would prevent officers and directors who bought stock while the reorganization plan was being considered from converting this stock into stock in the new company. Under the plan the stock was to be surrendered to the company at cost plus interest. The Commission found that the officers and directors were not guilty of any wrongdoing. The Supreme Court declared that there was no justification for the provisions requiring the officers and directors to turn back their stock at least insofar as the record disclosed, and remanded to the Court of Appeals with direction to remand to the agency for action consistent with the opinion.

plaintiffs was to have the merger set aside[6/], or their argument that this remedy was barred by laches (pp. 39-43), in that under the circumstances the parties should have resolved the issue before consummating the merger.

The appellees have not undertaken to respond to appellants' arguments or authorities, merely stating that litigation was contemplated and that suit was commenced promptly upon consummation of the merger (Appellees' Brief, p. 146). The appellees' statements are factual but hardly a satisfactory reply. In an equitable proceeding there are equities to be balanced, and it is evident that in this case the unscrambling of the two associations would be a monumental task, if not entirely impossible (see Appellants' Brief, pp. 39-43) which could have been avoided by an appropriate action for injunctive relief prior to consummation of the merger.

III

The Legality of the Merger Provision

The question of the validity of the contested merger provisions need not be reached if this Court should find that the District Court had no power to reform the merger, and that appellees' sole remedy (setting aside the merger) was barred by laches.

With respect to legality the District Court based its decision largely upon a legal conclusion that the (a) law, (b) the charter of

6/ There does not appear to be any remedy available to appellees short of having the merger set aside. A new merger agreement incorporating *pro rata* distribution even if acceptable to the Board and the California Commissioner, could not be voted on by Long Beach or its shareholders, since Long Beach is now an empty shell, without any membership, and without any business.

Long Beach, and (c) the Settlement Agreement required distribution of the surplus on a pro rata basis, and that, accordingly, contrary or inconsistent merger provisions were invalid.

The Ruling Re Statutory Power

The Court's ruling that under 12 U.S.C. 1464(i) pro rata distribution was required has already been the subject of comment herein. That statute was inapplicable.

The "Mutual" Ruling

Judge Hall also ruled that since Long Beach was a "mutual" association distribution of any surplus had to be pro rata, citing two cases which are concerned with insolvent companies.7/

The question is not whether shareholders in a mutual association are entitled to equal treatment. The question is whether the Association, with approval of the supervisory agency, has the right, upon distribution of net worth, to disqualify certain shareholders because their shares were purchased because of "inside" information, or for other equitable reasons. The corollary question is whether under all circumstances a supervisory agency must approve a pro rata distribution provision, regardless of equities. (See Appellants' Brief, pp. 44-49.)

Under the District Court's rigid and inflexible rule, the management of Long Beach, or of any mutual institution, could with knowledge of an impending liquidation or merger with a stock institution borrow millions of dollars to deposit in the mutual for

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7/ These cases are covered in footnote 8 herein.

a temporary period solely for the purpose of participating in the distribution of the institution's net worth. Again, management could sit idly by and permit its friends and acquaintances do the same thing. Yet the District Court would have us believe that the law is powerless to prevent such a result simply because the institution was a mutual and notwithstanding the obvious breach by management of its fiduciary duty to its savers.

Appellees talk at considerable length about mutuality (Appellees' Brief, pp. 45-57), but do not cite any authorities for the ruling that mutual savings and loan association shareholders must by law share, and share alike in the event of merger. The cases cited are irrelevant.[8/] Those that even appear remotely to bear upon the problem concern distribution after insolvency.

8/ The only cases which seem to bear on the question were:

Huntington v. Nat. Savings Bank, 96 U.S. 388, in which the question was whether persons starting a national bank (but who did not hold stock or make any investment) were entitled to the profits rather than the depositors. The Court ruled in favor of the depositors, since charter references indicated the bank was to be operated for their benefit.

Intermountain B & L Assoc. v. Gallegos, 78 F. 2d 972 (C.A. 9, 1935) in which a question arose as to whether, in the face of insolvency, Installment Certificate holders were creditors or shareholders. The Court ruled that under the circumstances they were creditors.

Pacific Coast Sav. Soc. v. Sturdivant, 165 Cal. 687 (1913) also involved the question as to whether a certain class of shareholders had become creditors of an insolvent B & L association.

In Wood v. Hamaguchi, 207 Cal. 79 (1929) the principal question was whether a statute authorizing the state superintendent of banks to levy assessments against shareholders of insolvent banks was constitutional.

Naturally, in such a case pro rata distribution of any remainder is equitable since the dollar lost is lost whether it was invested the day before insolvency or the year before. But where the distribution is of net worth then pro rata distribution can be extremely inequitable, as in this case. The two cases most in point, In Re Cleveland and In Re Springfield held that pro rata distribution did not have to be followed. (See Appellants' Brief, pp. 59-65.) Appellees' belabored effort to distinguish those cases on the facts (pp. 148-152) by their distorted version of alleged undisputed facts present in the instant cases (some of which are noted in the Appendix) bespeaks the weakness of their position.

Regardless of any factual distinctions the cases stand for the proposition that there is no legal requirement that in a mutual association pro rata distribution of net worth to shareholders as of a given date is mandatory.

The Ruling Re Board Regulations

The Court held that under Board regulations (12 C.F.R. 563.3) an association cannot create a preference unless it is spelled out in certain instruments such as the passbooks, certificates of deposit etc., and further held that since no such preferences were noted any preference would be invalid. Appellants concede that these passbook regulations are designed to prevent preferences; and we likewise concede that under normal circumstances preferences in distribution of net worth, upon liquidation of a federal savings and loan association, would be invalid for any number of reasons. But here we are

dealing with the right of an association or of shareholders or of the Board to prevent inequity -- when, as here, management has permitted a situation to arise which will unjustly enrich some insiders at the expense of the regular shareholders. Under such circumstances equity does not permit regulations, designed to protect shareholders, to be used as a weapon against them.[9/]

The appellees naturally adopt the District Court's point of view (Appellees' Brief, pp. 58-61) and argue that regulations have the force and effect of law -- a hornbook principle which appellants will not contest. The cases cited, however, are not apropos here. Both _Service_ v. _Dulles_ and _United States_ v. _Shaughnessy_ related to administrative failure to follow prescribed regulations in removing an employee from office, and in removing an alien from the country. These procedures for removal were _expressly_ designed to afford protection to the employee and to the alien. These cases are not relevant to the issue of whether passbook regulations can be used to prevent the regular shareholders from getting their rightful share of the net worth upon merger.

The Ruling Re the Charter Provisions

The Court ruled that the merger provisions were invalid, declaring that the charter provisions requiring _pro rata_ distribution

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9/ Let it be clearly understood that we do not contend that the attempt on the part of these newcomers to make a quick profit was criminal or fraudulent. Our criticism is directed against management which took no action to protect its bona fide shareholders. And the Board's action was designed to protect, not penalize, the bona fide shareholders.

of surplus in the event of a "liquidation, dissolution or winding up" of corporate affairs could not be waived or modified by the association, the Board or the court.

The appellants contend that the merger undertaken in this instance was not a "liquidation, dissolution or winding up" of corporate affairs, such as was contemplated by the charter provision. (See Appellants' Brief, pp. 44-48.) In support of this position the appellants cited a number of authorities (Appellants' Brief, p. 47).

The appellants further pointed out that even if there were a conflict between the charter and the merger agreement, the merger agreement would prevail, if its terms were fair (Appellants' Brief, pp. 48-50). This Court's attention is called to the significant fact that not one of the leading cases pertaining to the interpretation of a charter provisions providing for distribution of assets upon "liquidation, dissolution or winding up" of a corporate business, and not one of the cases supporting the principle that merger terms prevail over charter rights if the test of fairness is met, is either noted or commented upon by the District Court in its lengthy opinion, or noted or commented upon by appellees in their 192 page brief. Silence on these basic issues is not, we submit, a very compelling refutation.

The Settlement Agreement

The District Court held that the Settlement Agreement provided for pro rata distribution -- that Long Beach relied on the Agreement,

and that the Board is estopped to take a different position. As we have already pointed out, Long Beach elected not to liquidate in the manner provided in the Agreement, and went to the Board for approval of the merger, as required. The Court's ruling is without any merit.

Conclusion

The District Court has improperly undertaken to assume the power of a regulatory agency. The order reforming the Merger Agreement by requiring pro rata distribution was beyond the Court's power, and for that reason alone the judgment should be reversed. The only relief available to appellees was an order setting aside the merger, but since this relief is barred by laches, a mandate should issue directing the District Court to dismiss the Complaints.

BAREFOOT SANDERS,
Assistant Attorney General,

JOHN K. VAN de KAMP,
United States Attorney,

CARL EARDLEY,
MORTON HOLLANDER,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

Of Counsel

MAX WILFAND,
Assistant General Counsel,
Federal Home Loan Bank Board.

FEBRUARY 1967

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Carl Eardley
CARL EARDLEY
Attorney, Department of Justice

APPENDIX

The Factual Representations of Appellees Re Creation of Surplus

The main thrust of appellees' brief is founded on unsupported allegations concerning the effect of the new money upon the surplus of Long Beach. The chief contention is that the new money created the surplus. Appellees allege (Brief, pp. 2, 5, 10, 13, 14) that all except $842,000 of the $9.5 million in Equitable stock was created by the $42 million of new money flowing into Long Beach in the period April-December, 1962, and that the shareholders investing the $42 million have been penalized by the contested merger provisions. The facts are:

Re Creation of Surplus By New Money

The $42 million in added savings were not all "penalized" by the distribution terms of the Merger Agreement. Long Beach's own proxy statement (Exh. E, p. 5) recites that only $19 million were adversely affected. Appellees do not disclose the basis of their $842,000 figure, but that it is manifestly incorrect is evident from Long Beach's proxy statement. According to that statement (Exh. E, p. 22), Long Beach's book net worth at the end of calendar year 1961 (before the $42 million were deposited in Long Beach) amounted to $7,232,338. At the end of the following calendar year (after the $42 million had been added), its book net worth amounted to $7,625,331, an increase of $392,993 over the prior year. How one could assert that only $842,000 was available for distribution but for the added $42 million in the face of these figures, supplied by Long Beach, we cannot comprehend.

Re Good Will

Appellees allege repeatedly that the new money created good will in the amount of $3 million (Brief, p. 16). There is no factual support for this argumentative conclusion. On the contrary the record rebuts the allegation. The report of Standard Research Consultants, retained to evaluate Long Beach's net worth and to arrive at a fair exchange basis of such net worth for Equitable stock (Exh. J, p. 11) reads, in part, "A valuation of $9,250,000-$9,500,000 for Long Beach represents a ratio of market value to book value (as stated on the December 31, 1962 statement of condition) of 122%-126%. This is in line with the ratios at which investors are currently appraising stated book values of the comparative companies. Because of its operating history, Long Beach's ratio would be on the low side."

If we apply this formula to Long Beach's net worth as of December 31, 1961 (before the addition of the new accounts) Long

Beach's market value, based on its then book value of $7,232,338, and applying the lower range of 122%, was $8,823,452. As of December 31, 1962 its market value was $9,302,903. Thus the alleged $3 million added "good will" figure is seen to be closer to $480,000. And even this $480,000 could not possibly be attributable exclusively to the $19 million. For in this connection the report specifically noted with respect to the sharp increase in Long Beach accounts (Exh. J, pp. 6, 7), "It is anticipated that between $10,000,000-$11,000,000 will be withdrawn after the proposed merger situation has been resolved," an obvious recognition that this was "free-rider" money.

The Tax Saving

The appellants contend that as a result of the new money there was a "possible" tax saving of $3,884,000 (Brief, p. 17). This is a pure speculation, without any factual support.

Appellees point to the $3 million premium and the almost $2 million in accrued interest paid by the Insurance Corporation on the loans it acquired pursuant to the Settlement Agreement in compromise of its $45 million claim against Long Beach. Appellees label this amount of close to $5 million as net taxable income. It is true that under the former federal tax law (26 U.S.C. 593) such income was tax-free if it was transferred within, or as soon as practicable at the close of, the taxable calendar year (1962) to a bad debt reserve account, provided that the tax-free amount could not be greater than the amount by which 12% of its savings at the end of the calendar year (1962) exceeded the sum of its surplus, undivided profits and reserves at the beginning of the taxable calendar year (1962). The first answer to the conclusionary assertion that there was a $3,884,000 1/ tax saving is that none of Long Beach's income for the 1962 calendar year was transferred to a bad debt reserve account. Long Beach's own proxy statement (Exh. E, p. 22) shows that its reserves for the year 1962 decreased rather than increased. Second, the $5 million was not net taxable income. Appellees admit (Brief, p. 28) that Long Beach had a $1 million operating loss during 1962. Its nonrecurring income for that year (Exh. E, pp. 22, 23, note 3), after taking into account the $5 million resulting from the Settlement Agreement and the extraordinary expenses attributable thereto, amounted to $1,893,161. Thus at best, after deducting Long Beach's operating loss of $1 million, its net taxable income for 1962 could only have come to $893,161. Third, the tax shelter was not an automatic 12% of savings, as appellees constantly state. It was, at most, the difference between 12% of savings at the end of the taxable 1962 calendar year and the sum of Long Beach's surplus and undivided

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1/ How this figure is computed is never explained.

profits at the beginning of 1962. According to Long Beach's own figures (Exh. E, p. 22) the latter sum was $7,232,338. Thus, there could be no tax shelter for income earned in the 1962 calendar year based upon additional savings until the savings capital reached $60 million. Finally, of course, Long Beach's own proxy statement (Exh. E, p. 22) shows no federal tax liability for the year 1962; indeed it does not even refer to a contingent liability with respect to the $5 million in its specific discussion of income taxes (Exh. E, p. 34) This alleged tax saving was never once mentioned in the lengthy negotiations between the Board and Long Beach prior to the consummation of the merger (Exhs. C-1 - C-72). It is an obvious afterthought, developed in an effort to justify management's failure to observe its elementary fiduciary responsibilities.

The $3 Million Saving

Appellees also attribute a $3 million saving to the new money because under the Settlement Agreement's liquidation plan Long Beach would have had to withhold from distribution $3 million for ten years. (Brief, pp. 17, 20.) They go on to say that the $42 million (or should it be the $19 million) of money led to the adoption of the Merger Agreement which had no provision for the withholding of $3 million. Therefore, they argue, the new money saved $3 million. This is an obvious non-sequitur, and not worthy of a response.

With regard to the contention that without the new money there would have been no merger the record discloses that as part of the Long Beach liquidation plan set forth in the Settlement Agreement Equitable planned to assume liability for all of Long Beach's savings accounts in exchange for an equal amount of Long Beach assets. This occurred in February 1962, long before any of the speculative deposits came into Long Beach.

Other Misstatements of Fact

Re the alleged forfeiture.

Appellees persistently repeat that the distribution provisions of the Merger Agreement constituted a forfeiture by the Board of the savings accounts affected by such provisions. This is nonsense. The individuals received the normal dividends, and were able to withdraw their savings. They simply lost the windfall they expected to receive by virtue of the distribution of Long Beach's net worth.

Re the Lack of a Hearing

The appellees also make it appear that the Board issued an order, without a hearing and without findings, which penalized the

shareholders (pp. 97-105). This is another characteristic attempt to confuse the issues. The fact is that faced with Board disapproval of a merger agreement which sanctioned the siphoning off of a large part of the surplus by the free riders Long Beach prepared a merger agreement which contained the provisions appellees now contest. This agreement was executed by Long Beach, by Equitable, approved by the shareholders of both companies, and then given approval by the supervisory federal and state agencies. So even had the Board imposed forfeitures Long Beach participated in the action, and has no cause for complaint.

Insofar as the lack of hearing and findings is concerned it is clear that there was no occasion for a hearing or findings, since the Board action was a simple approval of a proposed merger. And it should be noted that the adjudicatory provisions of the Administrative Procedure Act are not applicable to the Board's function in reviewing merger applications. Accordingly, the decisional process of that statute (5 U.S.C. 1007) requiring findings and conclusions are not applicable. See Bridgeport Federal Savings and Loan Association v. Federal Home Loan Bank Board, 307 F. 2d 580 (C.A. 3); Federal Home Loan Bank Board v. Rowe, 284 F. 2d 274 (C.A.D.C.); First National Bank v. First Federal Savings and Loan Association, 225 F. 2d 33 (C.A.D.C.).

Re the Small Depositors

Appellees' argument (Brief, pp. 87-95) that the distribution formula in the Merger Agreement affects small depositors more than large is erroneous. This argument is presumably based on its Exhibit 13 which purports to classify, by size, accounts adversely affected by the distribution formula. The information given in that exhibit is misleading. The crucial matter, the dollar amount affected in the various size groupings, is not supplied. The underlying data is contained in Equitable's answers to appellants' interrogatories filed in the Clerk's Office on April 28, 1964, but thereafter lost. Notwithstanding that Rule 56 provides for resort to interrogatories in the consideration of motions for summary judgment this Court ruled, by Order filed September 20, 1966, that a true copy of Equitable's answers to the interrogatories could not be substituted for the lost original, or used on this appeal. In any event, the undisputed statistical data set forth in Appellants' Brief (pp. 54-55) demonstrates that it is the large speculative depositor and not the small depositor who is adversely affected by the distribution formula. (See 3R 1345.)

Appellees also suggest (Brief, p. 65) that when distribution formula was agreed upon the Board had before it the record of every saver whose account was pledged or assigned. This is not so.

What the Board had was the record of accounts which had increased by $10,000 or more between April 2, 1962 and November 30, 1962 (Exhs. C-29, C-29A). It had no documentation with respect to any other accounts.

This pretended concern of Long Beach for the small shareholders was not manifest in 1962-1963 when the terms of the proposed merger were the subject of discussion between the Board and Long Beach. If the recommendations of the Board would unfairly discriminate against small shareholders then was the time for Long Beach to raise its voice on their behalf. But Long Beach was only protesting the Board's position re the big depositors.

Re Long Beach Insolvency

The appellees point out that in the period from April 2, 1962 through July 31, 1962 withdrawals amounted to $13 million and that deposits came to $49 million. But, they say, had there been no new deposits, Long Beach would have lost 44% of its then savings capital (Brief, p. 8) and further "the forced sale sacrifice of assets needed to raise $13,000,000 in cash (44% of all deposits) to immediately pay withdrawing panicky depositors would have wiped out all surplus, rendered Long Beach Federal insolvent 2/ and forced it to close forever." This is, of course, sheer fantasy. First, of course, it is based upon a non-existent hypothesis. There were new deposits, far in excess of $13 million, which were not adversely affected by the distribution formula of the Merger Agreement. Second, appellees would have this Court believe that the $13 million of withdrawals constituted part of the $30.5 million on deposit in Long Beach prior to the return of the association on April 2, 1962. Yet Mr. Gregory himself told the Board that Mr. Louis Boyar and some of his associates had, after the June 30, 1962 dividend, withdrawn about $10 million of the approximately $20.5 million that "celebrities of the financial and entertainment world

2/ The brief reads (p. 27, lines 2, 3), "The Association, $47,000,000 in debt, due on demand, with only $35,000,000 left in savings deposits was obviously insolvent." This statement, made by persons closely connected with a financial institution, is incredible. Merely to recite partial figures from the liability side of a balance sheet to show insolvency without regard to the other liabilities and without mentioning assets is irresponsible.

widely known for their great wealth and business accumen" had invested in Long Beach on and after April 2, 1962 (3R 1000, 1139, 1376; Exhs. C-5, C-6, C-15). These "celebrities of the financial and entertainment world widely known for their great wealth and business accumen" are the "panicky" depositors for whom appellees are so solicitous. 3/

Re Mr. McMurray

The reference in Appellees' Brief (pp. 61-63) to Mr. McMurray's testimony before a congressional committee that all depositors in a mutual institution are treated alike is taken out of context. For the complete discussion of the Long Beach situation, see pp. 30-59, 66-81, 82-86, 116-117, 119-120, 142-163, 433-434, 476-487 of Exh. 22, 3R 1343-1344.

Re The Board Change of Position

Nor is it correct for appellees to suggest (Brief, p. 64) that the Board originally recommended a distribution formula which affected accounts in excess of $100,000 and then changed its mind. An attempt was made in the summer of 1962 to reach a compromise on the basis of such accounts, but that effort failed and the Board's position was set forth in its letter of May 23, 1963 to Long Beach (3R 1380; Exhs. C-12, C-23, C-35, C-39, C-41, C-43).

3/ We do not know the identity of those who withdrew the other $3 million. But, it should be noted that every financial institution has withdrawals in the normal course of its business operations, particularly after a dividend period.